

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE

CRAIG CUNNINGHAM,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	3:15-CV-00847
ENAGIC USA INC., PETER POZELI,	§	
TERRY COLLINS, RICK FREEMAN,	§	
ANGELA LINER, CHRISTIAN KINNEY,	§	
And DOES 1-10	§	
	§	
Defendants.	§	

**DEFENDANT ENAGIC USA, INC.'S MOTION TO DISMISS**

Pursuant to Federal Rules of Civil Procedure 8, 9, and 12(b)(6), Defendant Enagic USA, Inc. (“Enagic”), moves to dismiss Plaintiff’s complaint as follows:

1. Plaintiff Craig Cunningham’s (“Plaintiff”) claims for violations of the Telephone Consumer Protection Act, 47 U.S.C § 227, et seq. (“TCPA”) should be dismissed pursuant to Rule 12(b)(6) because the complaint does not allege facts that demonstrate Enagic initiated telephone calls or sent text messages to Plaintiff’s cellular telephone line. Rather, Plaintiff’s complaint alleges that co-defendants, Peter Pozelli, Terry Collins, Rick Freeman, Angela Liner and Christian Kinney, not Enagic, called Plaintiff. The complaint does not allege facts that establish these individuals are representatives of Enagic and were acting on behalf and at the direction of Enagic.

2. The complaint should be dismissed because Plaintiff failed to plead facts that, if proven, would demonstrate Enagic used an automatic telephone dialing system to call Plaintiff and that the automated calls were made without Plaintiff’s prior express consent. Plaintiff’s

complaint further fails to allege the content of the supposed artificial or prerecorded voice calls, such that it is not possible to determine whether the calls are subject to the TCPA's restrictions.

3. Plaintiff's complaint fails to state the dates and times of the calls, the specific content of the calls, the telephone numbers that allegedly called Plaintiff, the information that was displayed on Plaintiff's caller ID at the time of the offending calls or the telephone number at which Plaintiff received the calls.

4. Federal courts addressing the sufficiency of the allegations in a TCPA complaint require "more than a bare assertion of [the TCPA] elements, looking instead to the plaintiff's factual allegations to determine whether a TCPA claim can be sustained." *Sepehry-Fard v. MB Fin. Serv.*, 2014 U.S. Dist. LEXIS 71568 (N.D. Cal. May 23, 2014) (citing *Kramer v. Autobytel, Inc.*, 759 F.Supp.2d 1165, 1171 (N.D. Cal. 2010)); *see also Strand v. Corinthian Colleges, Inc.*, 2014 U.S. Dist. LEXIS 52963 (W.D. Mich. April 17, 2014) (dismissing a TCPA complaint because "[n]otice pleading, under *Twombly* and *Iqbal*, necessarily requires that a plaintiff plead the telephone number in question to 'raise a right to relief above the speculation level'" (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

5. As discussed in more detail in the accompanying Memorandum, the conclusory allegations in the complaint are inadequate to state a claim upon which relief can be granted and the complaint therefore should be dismissed.

6. The grounds and precedent for this motion are more fully set forth in Enagic's Memorandum in Support of its Motion to Dismiss, filed contemporaneously herewith and incorporated by reference into this motion.

WHEREFORE, Enagic USA, Inc. respectfully requests that this Court dismiss all of Plaintiff's claims against it and that this Court grant such other relief to which Enagic is justly entitled.

Dated: September 18, 2015

RESPECTFULLY SUBMITTED,

/s/ J. Anne Tipps

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Attorneys for ENAGIC USA, INC.

**CERTIFICATE OF SERVICE**

I do hereby certify that a copy of the foregoing pleading has been served on Plaintiff by U.S. Mail on this the 18th day of September, 2015.

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*/s/ J. Anne Tipps* \_\_\_\_\_

J. Anne Tipps